Nos. 04-805 and 04-814

DEC 15 2005

IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER SHELL OIL COMPANY

RONALD L. OLSON
Counsel of Record
BRADLEY S. PHILLIPS
STUART N. SENATOR
PAUL J. WATFORD
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner
Shell Oil Company

TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

ARGUMENT 2

I. SECTION 1 OF THE SHERMAN ACT DOES NOT APPLY 2

II. EVEN IF SECTION 1 APPLIES, THE PER SE RULE DOES NOT 9

III. THE ANCILLARY RESTRAINTS DOCTRINE IS IRRELEVANT HERE 13

IV. "QUICK LOOK" ANALYSIS DOES NOT APPLY HERE 14

V. RESPONDENTS HAVE DISTORTED THE FACTUAL RECORD 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Maricopa County Med. Soc'y,
457 U.S. 332 (1982)..... *passim*

Augusta News Co. v. Hudson News Co.,
269 F.3d 41 (1st Cir. 2001).....10

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,
441 U.S. 1 (1979).....6, 7, 12

California Dental Ass'n v. FTC,
526 U.S. 756 (1999).....14

Citizen Publ'g Co. v. United States,
394 U.S. 131 (1969)..... *passim*

Copperweld Corp. v. Independence Tube Corp.,
467 U.S. 752 (1984).....2, 4

Freeman v. San Diego Ass'n of Realtors,
322 F.3d 1133 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003).....13

FTC v. Indiana Federation of Dentists,
476 U.S. 447 (1986).....5, 6

NCAA v. Board of Regents,
468 U.S. 85 (1984).....4, 6

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,
472 U.S. 284 (1985).....10

Polygram Holding, Inc. v. FTC,
416 F.3d 29 (D.C. Cir. 2005).....14, 17

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986).....10

State Oil Co. v. Khan,
522 U.S. 3 (1997).....12

TABLE OF AUTHORITIES
(continued)

Page(s)

Timken Roller Bearing Co. v. United States,
341 U.S. 593 (1951).....6, 10

United States v. Sealy, Inc.,
388 U.S. 350 (1967).....6

United States v. Socony Vacuum Oil Co.,
310 U.S. 150 (1940).....6

United States v. Topco Assocs.,
405 U.S. 596 (1972).....6, 10

OTHER AUTHORITIES

PHILLIP E. AREEDA & HERBERT HOVENKAMP,
Antitrust Law (2d ed. 2003).....5, 11

INTRODUCTION

Respondents admit the fundamental fact that, with the formation of the Equilon and Motiva joint ventures, Shell- and Texaco-branded gasoline was manufactured, wholly owned and solely marketed by these ventures. Shell and Texaco no longer competed "in the sale of domestic gasoline." Brief for Respondents 25. Instead, they pooled their capital and shared the risks of loss and the opportunities for profit. This fundamental fact means that Shell and Texaco had a complete unity of interests with respect to the pricing of Shell- and Texaco-branded gasoline in the United States and that, under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), Section 1 of the Sherman Act should not apply to the pricing decisions at issue here. As this Court stated in *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . is regarded as a single firm competing with other sellers in the market." *Id.* at 356.

This fundamental fact also means that, even if Section 1 did apply, the per se rule should not, because a decision about the relative prices of the two brands could not restrict competition that would otherwise exist. Respondents rely principally upon their broad reading of *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969). But Respondents do not and cannot dispute that the joint venture in *Citizen Publ'g* involved joint pricing of products that were not wholly owned by the purported joint venture. Respondents also do not and cannot dispute that, in the three and one-half decades since *Citizen Publ'g*, this Court has rendered decisions that are flatly inconsistent with their reading of it.

Of necessity, a manufacturing and marketing joint venture must set prices for the products it owns and sells; indeed, Respondents do not dispute that it was legal for Shell and

Texaco to unify the pricing *function* for the two brands under the control of each venture, overseen by that venture's owners. Respondents also do not dispute that the actual pricess set for the two brands should be irrelevant to the Section 1 analysis. What flows ineluctably from these undisputed principles is that, contrary to the Ninth Circuit's holding, particular decisions regarding pricing and pricing strategies for a joint venture's own products cannot be condemned as per se illegal price fixing, and particular pricing decisions need not be individually justified under the ancillary restraints doctrine.

ARGUMENT

I. SECTION 1 OF THE SHERMAN ACT DOES NOT APPLY.

In *Copperweld*, this Court reasoned that Section 1 of the Sherman Act should not apply to the joint conduct of entities that have "a complete unity of interest" with respect to the economic activity in question, because coordination between such entities does not represent "a sudden joining of two independent sources of economic power previously pursuing separate interests." 467 U.S. at 770-71. Respondents do not meaningfully dispute that Shell and Texaco, once they had agreed to form the joint ventures, had a complete unity of interest with respect to the pricing of Shell- and Texaco-branded gasoline in the United States. Indeed, Respondents expressly admit that it was Shell's and Texaco's "joint selling" of branded gasoline through the ventures that "eliminated important price competition between them." Brief for Respondents 21. Under *Copperweld*, therefore, Section 1 does not apply to decisions with respect to the pricing of such gasoline.[1] This is true regardless of whether a

---

[1] Respondents assert that Shell and Texaco did not raise this argument in the court of appeals. Brief for Respondents 22 n.19. In fact, Shell and Texaco argued in their brief to the Ninth Circuit

plaintiff characterizes those decisions as having been made by the joint venture's owners rather than by the management of the venture that the owners oversee. *See Maricopa*, 457 U.S. at 356-57 ("a price-fixing agreement among the [owners] would be perfectly proper").

Indeed, even under the Ninth Circuit's flawed reasoning, Respondents' brief makes the inapplicability of Section 1 "plain beyond peradventure." *Cf. Citizen Publ'g*, 394 U.S. at 135. The Ninth Circuit suggested that there was a disputed issue of fact whether Shell and Texaco reached a decision that the joint ventures would charge the same price for the two brands of gasoline *before* the joint ventures were actually formed. Pet. App. 19a & n.11. Only because it assumed that factual issue about timing existed, the Ninth Circuit concluded that it must assume, for purposes of summary judgment, that the decision "was not [one] made by a single economic entity [but] a decision made by competitors." *Id.* at 20a & n.11. The United States likewise cites this reasoning by the Ninth Circuit in its suggestion that this Court not reach the question whether Section 1 applies at all to the conduct alleged in this case. Brief for the United States as Amicus Curiae Supporting Petitioners 11-12 n.6.

Respondents have now conceded, however, that the decision to charge the same price for Shell- and Texaco-branded gasoline was reached *after* the formation of the joint ventures. Brief for Respondents 1 ("Eight months after

---

that "Section 1 of the Sherman Act, which regulates only joint conduct, does not even apply to pricing and other marketing decisions that an economically integrated joint venture makes post-formation. The courts view these as unilateral decisions of an independent company, not as the parent corporations' joint conduct." Appellees' Brief, filed Jan. 30, 2003, at 18. The Ninth Circuit likewise specifically referenced the argument. Pet. App. 17a (noting "defendants' argument . . . that joint ventures such as Equilon and Motiva are incapable of violating the Sherman Act").

forming the ventures, Shell and Texaco agreed with each other to take pricing discretion away from the ventures and directed them to charge the same dealer tankwagon prices for the Shell and Texaco brands of gasoline."); *id.* at 3 ("At that time [September 1998, following formation of the ventures], Shell and Texaco agreed to require Equilon and Motiva to set the same price for the Shell and Texaco brands."); *id.* at 8 ("At that point [September 1998], Shell and Texaco agreed to change the pricing.").[2] The United States agrees that, in this circumstance, under *Copperweld* Section 1 does not apply at all:

> Per se treatment would also be inappropriate even if . . . petitioners' agreement to unify the pricing of the two brands occurred *after* Equilon became operational. At that point, petitioners were not independent participants in the downstream markets and therefore were incapable of forming a horizontal agreement within the contemplation of the antitrust laws—i.e., "an agreement among competitors on the way in which they will compete with one another," *NCAA v. Board of Regents*, 468 U.S. 85, 99 (1984)—with respect to operations in those markets. . . . This Court's decision in *Copperweld*, which makes clear that the independent conduct of a unitary economic actor cannot give rise to Section 1 liability, would preclude any application of Section 1 in that context. See *Copperweld*, 467 U.S. at 771.

Brief for the United States as Amicus Curiae Supporting Petitioners 18-19 (emphasis in original).

Respondents argue that there is no authority for applying

---

[2] Respondents' inconsistent suggestion that the Brand Management Protocols show a pre-formation agreement on pricing is discussed below. *See infra* at 17-18.

Copperweld to a joint venture and that doing so would be inconsistent with this Court's prior decisions. Both arguments are wrong. In *Maricopa*, this Court stated that a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . is regarded as a single firm competing with other sellers in the market." 457 U.S. at 356. A leading antitrust treatise similarly reasons that, "[o]nce a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy." VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478c, at 325 (2d ed. 2003).

That is precisely the situation here. In *Copperweld*, this Court counseled that the determination whether to treat actions of related entities as unilateral conduct under Section 1 should be based upon "the logic underlying Congress' decision to exempt unilateral conduct from Section 1 scrutiny," 476 U.S. at 776, and that logic leads directly to the conclusion that Section 1 should not apply here.

None of the prior decisions of this Court relied upon by Respondents involved a situation such as the one present here—where, as a result of the formation of a procompetitive joint venture, there is no further relevant competition either between the joint venturers or between the joint venture and one or both of the venturers; and where the challenged restraint applies only to the business of the joint venture, not to any non-venture business of the venturers. As a result, in none of those cases was there a comparable "complete unity of interest" among the parties with respect to the challenged conduct.[3] *See Maricopa*, 457 U.S. at 356 (finding that a

---

[3] Amicus American Antitrust Institute ("AAI") agrees that "a joint venture should be treated as a single firm for purposes of Section 1

purported joint venture among physicians was per se illegal because the venture consisted *solely* of the competing physicians' agreement on maximum prices to be charged for particular procedures); *National Collegiate Athletic Assn. v Board of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984) ("[t]he NCAA is an association of schools which compete against each other to attract television revenues"); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 456 (1986) (dentists were in "competition for patients"); *Citizen Publ'g*, 394 U.S. at 133-35 (each of two competing newspapers continued to produce its own news and editorial content, and the district court found that the formation of the joint venture was itself anticompetitive); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 595-98 (1951) (rejecting "joint venture" characterization of horizontal agreements between an American corporation and two foreign corporations in which it owned 30 and 50 percent interests, where the agreements involved no integration of production or sharing of profits or losses); *United States v. Sealy, Inc.*, 388 U.S. 350, 351 (1967) (each member of the joint venture continued to market and sell products in the relevant market); *United States v. Topco Assocs.*, 405 U.S. 596, 598 (1972) (each member of cooperative association "operates independently" without "pooling of earnings, profits, capital, management or advertising resources"); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 11, 19 (1979) (individual composers and authors—the members of the joint ventures—remained in direct competition with ASCAP and BMI); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940) (where no joint venture was even claimed to exist). Moreover, contrary to Respondents' suggestion, Brief for Respondents 28, the courts are quite capable of determining

---

. . . when there is a complete unity of economic interest among those controlling the venture – *i.e.*, their sole economic interest is in maximizing the competitive ability and profitability of the venture-as-a-whole." Brief for AAI 5.

when the parties to a purported joint venture have a complete unity of interest and when they do not, just as, in applying other doctrines under the antitrust law, the courts regularly determine whether a restraint is "ancillary" to a joint venture and whether it "unreasonably" restrains trade.

Respondents argue that the formation of the joint ventures did not "end all competition between Shell and Texaco and eliminate them as independent centers of decisionmaking." Brief for Respondents 25. While it is true that Shell and Texaco continued to compete in *other* markets, even Respondents concede that, ~~as the~~ District Court found and the Ninth Circuit agreed, the formation of the joint ventures eliminated competition between Shell and Texaco in the *relevant* market. *See* Pet. App. 41a ("The creation of the alliance ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline."); *see also* Brief for Respondents 6 ("Where [Shell and Texaco] agreed not to compete with The Alliance was the domestic sale of gasoline and related products."); *id.* at 25 ("What they eliminated was competition in the sale of domestic gasoline while The Alliance lasted.").[4]

It is irrelevant that the joint ventures could be unwound, and that competition between Shell and Texaco might therefore have resumed. The challenged decision to price the two brands of gasoline the same applied only to sales by the

---

[4] Indeed, in the district court, Respondents stipulated to this undisputed fact. J.A. 76 (¶ 42) ("The formation of Equilon ended competition between Shell and Texaco in the Western United States with respect to the downstream refining and marketing of gasoline."); *id.* at 77 (¶ 45) ("The formation of Motiva ended competition between Shell and Texaco in the Eastern United States with respect to the downstream refining and marketing of gasoline.")

joint venture.[5] If the ventures were "unwound," and the two brands of gasoline became competing products again, each company would be free to price its gasoline as it saw fit; if there were any continuing agreement between Shell and Texaco, that agreement would be subject to scrutiny under Section 1.

Similarly, the fact that Shell and Texaco continued to exist as separate entities and therefore as "independent centers of decisionmaking" is irrelevant. Affiliated corporations also are separate entities and independent centers of decisionmaking; nevertheless, when they have a complete unity of interest, agreements between them are treated as equivalent to the decisions of a single firm and, under *Copperweld*, are not subject to scrutiny under Section 1. Similarly, agreements between the co-owners of a legitimate joint venture, as to which those co-owners have a complete unity of interest, should not be subject to scrutiny under Section 1.

---

[5] Respondents assert that Shell and Texaco "were able to offer no evidence of how this restraint served the interests of Equilon and Motiva" (Brief for Respondents 26), and argue that the pricing was not "compelled by *Robinson-Patman* compliance" (*id.* at 14 n.16). But the District Court found that "Defendants offer a plausible and justifiable reason why Equilon and Motiva would independently choose to set the price of Shell and Texaco branded gasoline the same: from the perspective of the ventures, the products are fungible." Pet. App. 52a. Further, Petitioners have never contended that the Robinson-Patman Act *compelled* the pricing policy; rather, the point is that the pricing policy allowed the ventures to avoid Robinson-Patman challenges by this very group of dealers on whose behalf Respondents filed this litigation. *See* Brief for Petitioner Shell Oil Co. 4. Indeed, the only reasonable inference is that the decision was based on the interest of the joint ventures, not any separate interests of Shell and Texaco, because, before the joint ventures existed, Shell and Texaco had each separately decided that it was in its *individual* interest to price its brand at a different level than the other brand.

II. EVEN IF SECTION 1 APPLIES, THE PER SE RULE DOES NOT.

As noted, the District Court found, and the Ninth Circuit agreed, that the creation of the joint ventures "ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline." Pet. App. 4a. Respondents do not dispute this finding, except to suggest that competition between Shell and Texaco could have *resumed* at some point if the joint ventures were unwound. That, of course, would be true with respect to *any* joint venture; indeed, it would be true of even a merger, following which the merged entity could be split apart, resulting in competition similar to that which existed before the merger. That does not change the simple fact that, at all times when the decision to charge the same prices for Shell- and Texaco-branded gasoline was effective, those products were not in competition with each other. As a result, *that decision did not restrain competition at all*; far less was the decision one that would have "predictable and pernicious anti-competitive effects" such that it could be per se illegal.

Rather than addressing the economic and common sense logic of this proposition, Respondents assert repeatedly that this Court's decision in *Citizen Publ'g* "is directly on point and controlling." *E.g.*, Brief for Respondents 20. Respondents are wrong for two reasons. First, *Citizen Publ'g* is readily distinguishable. There, the joint venture partners did not fully integrate their operations in the relevant market; instead, they maintained their separate production of news and editorial content and therefore remained in competition with each other. In addition, quite unlike the situation here—where the FTC reviewed the formation of Equilon and Motiva and determined that those joint ventures were not anticompetitive—in *Citizen Publ'g* the district court found that the joint newspaper operating agreement was anticompetitive and violated both Section 2 of the Sherman Act and Section 7 of the Clayton Act. 394 U.S. at 135.

Second, to the extent that *Citizen Publ'g* might nevertheless be read broadly, as Respondents urge (Brief for Respondents 19), for the proposition that pricing or other decisions that are related only to the products of an otherwise procompetitive joint venture may be condemned as per se illegal, the opinion is inconsistent with *Broadcast Music*, *NCAA*, and other subsequent decisions of this Court that have repudiated the initial suspicion of joint ventures that reached its apex with this Court's 1972 decision in *United States v. Topco Associates*, 405 U.S. 596 (1972), just three years after *Citizen Publ'g* was decided. *See Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) (noting that, notwithstanding *Topco*, "it is [now] commonly understood . . . that per se condemnation is limited to 'naked' market division agreements, that is, to those that are not part of a larger pro-competitive joint venture"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224-29 (D.C. Cir. 1986) (noting that *Topco*'s per se condemnation of all horizontal restraints, even if they are ancillary to a partnership or joint venture, was overruled by this Court's decisions in *Broadcast Music, National Collegiate Athletic Assn.* and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985)).[6] Notably, although Shell made precisely this point about *Citizen Publ'g, see* Brief for Petitioner Shell Oil Co. 24 n.11, Respondents do not respond to it in any manner.[7]

---

[6] *See also* Brief for AAI 14 ("[*Topco*] may not reflect this Court's approach after [*Broadcast Music*].").

[7] Respondents assert that this Court's decisions in *Timken* and *Maricopa* "involved joint venture price fixing." Brief for Respondents 41. In fact, in both of those cases, the Court determined that there was no real integration of productive assets sufficient to constitute a true joint venture; it was only for that reason that the Court found the challenged restraints to be per se illegal. *Timken*, 341 U.S. at 597-98; *Maricopa*, 457 U.S. at 356.

Respondents' reliance on Professor Areeda's example regarding a joint selling arrangement between Ford and General Motors is similarly misplaced. *See* Brief for Respondents 20-21. As the quotation from Professor Areeda's treatise makes clear, the hypothetical arrangement is one in which Ford and General Motors would continue to compete in the sale of automobiles and would not share in either the risks or rewards of such sales; instead, they would simply eliminate *one* form of competition between their respective, separately owned products—price competition—by selling through a common distribution agent. Here, by contrast, Shell and Texaco merged all of their domestic production and marketing operations, thereby both "pool[ing] their capital and shar[ing] the risks of loss as well as the opportunities for profit," *see Maricopa*, 457 U.S. at 356, and ending all competition between Shell- and Texaco-branded gasoline, without regard to any agreement with respect to the pricing of those products.[8] Moreover, Professor Areeda's point is that the *formation* of the Ford-General Motors joint selling arrangement would itself be an unreasonable restraint; nowhere does he suggest that, if it were otherwise (and Respondents have waived any rule of reason challenge here), joint pricing of the two companies' products could be condemned as per se (or otherwise) illegal under Section 1. *See* Areeda & Hovencamp, *supra*, ¶ 1475, at 304 ("[O]nce antitrust law deems the creation of an organization to be lawful, it would be inconsistent to prevent it from functioning by characterizing its normal operations as per se or otherwise unlawful conspiracies.").

---

[8] Professor Areeda acknowledges that even a joint selling arrangement between two automakers with significant market shares like Ford and General Motors would *not* be per se illegal. Brief for Respondents 21 (*quoting* P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981) ("not unlawful *per se*").

Respondents assert that "[t]he restraint . . . was a direct restraint on price" and therefore per se illegal. Brief for Respondents 33. Respondents' suggestion that every "direct restraint on price" is per se illegal "price fixing" is precisely the sort of "overly simplistic and overbroad" literalness that this Court has rejected. *Broadcast Music*, 441 U.S. at 9. Every time the owners of a business set a price for their products, there is a "direct restraint on price," just as, every time two parties enter into a contract, there is a "restraint of trade." This Court long ago held that not every literal "restraint of trade " is unlawful under Section 1, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); and the Court has expressly stated that, "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act." *Broadcast Music*, 441 U.S. at 9. That principle, not *Citizen Publ'g*, is directly on point and controlling here.

Throughout their brief, Respondents focus exclusively on the decision that the joint ventures would charge the same price, in the same geographic area, for the same grade of Shell- and Texaco-branded gasoline. Nowhere do Respondents suggest that the decision by Shell and Texaco to unify the pricing *function* for the two brands—that is, to put the price setting under the control of each venture's management, supervised by its owners—was illegal.[9] Nor could they reasonably do so, given this Court's clear statement in *Broadcast Music* that two partners may set the prices of their goods *without* violating the Sherman Act. Yet Respondents simply ignore altogether Shell's explanation that the actual prices set for the brands—whether those prices be the same or 2 cents different, or the same on Monday and 2

---

[9] The uncontroverted evidence supports the obvious point that the ventures could not have operated efficiently without such unification of the pricing function for the jointly owned products that the ventures were producing. J.A. 130-31 (¶¶ 61-62).

cents different on Tuesday—is totally irrelevant to the Section 1 analysis. *See* Brief for Petitioner Shell Oil Co. 26-27. If it were illegal price-fixing for Shell and Texaco jointly to set the *same* price for the two brands, it would be equally illegal price-fixing for them jointly to set *different* prices for the brands—a totally irrational result squarely at odds with *Broadcast Music*.

III. THE ANCILLARY RESTRAINTS DOCTRINE IS IRRELEVANT HERE.

Both Petitioners and the United States demonstrated in their briefs that the ancillary restraints doctrine, which was applied by the Ninth Circuit, has no relevance here because the challenged restraint relates exclusively to the products of the joint ventures, not to any business activities of Shell or Texaco outside those joint ventures. *See* Brief for Petitioner Shell Oil Co. 27-33; Brief for the United States as Amicus Curiae Supporting Petitioners 21-28. Respondents' only response, other than quotation from an article to the effect that the Ninth Circuit correctly applied the ancillary restraints doctrine, Brief for Respondents 40-41, is to assert that *Citizen Publ'g*, *Broadcast Music*, and *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003), "involve restrictions on pricing the venture's own products." Brief for Respondents 47-48. Neither *Citizen Publ'g* nor *Broadcast Music* applied the ancillary restraints doctrine; and, of course, *Broadcast Music* itself compels the conclusion that the restraints at issue here are *not* per se illegal. In *Freeman*, the Ninth Circuit emphasized that the joint venture partners remained competitors outside their joint venture and that the challenged agreements were per se illegal because they restrained that competition among them. 322 F.3d at 1149-50. It is, therefore, just another example of the principle that the ancillary restraints doctrine applies only to restraints on competitive activities outside the joint venture.

IV. "QUICK LOOK" ANALYSIS DOES NOT APPLY HERE.

As Respondents note, this Court has stated that a restraint may be held to violate Section 1 under an abbreviated, or "quick look," rule of reason analysis where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Such abbreviated analysis has no application here, however, because, for the reasons explained in Shell's opening brief and above, the challenged restraint—a decision about the pricing of two products of an integrated joint venture—had *no effect* on competition, far less an obvious anticompetitive effect. No justification whatever for the restraint was therefore required. If one were, it would suffice that the joint venture itself was legitimate and procompetitive and that pricing of a production and marketing joint venture's products is essential to the operation of the venture. As discussed above, it is irrelevant whether the prices set are the same, different or sometimes the same and sometimes different.

Respondents mistakenly rely on *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), in support of application of "quick look" analysis here. In *Polygram*, the D.C. Circuit expressly relied on the facts that the parties to the joint venture had imposed price and advertising restraints on "products that were not part of the joint undertaking" and that the venturers had continued to sell independently and in competition with their joint venture and each other. *Id.* at 38. The partners were not simply setting the prices of the joint venture's goods—which *Broadcast Music* holds is not illegal price-fixing—but instead restricting the prices of goods sold in competition with the joint venture.[10] No remotely similar

---

[10] By focusing on the restriction of products *outside* the joint venture, *Polygram* also illustrates the crucial difference between a

restraint is alleged here.

V. RESPONDENTS HAVE DISTORTED THE FACTUAL RECORD.

Respondents distort the factual record in numerous respects. The distortions are immaterial, because none of them, even if correct, would change the fundamental fact that, once the ventures were formed, Shell- and Texaco-branded gasoline did not compete. But Shell responds to them briefly here lest these factual distortions obfuscate the issues.

First, Respondents assert that the pricing decisions caused price increases. There is absolutely no evidence, however, that any increase in the price of refined gasoline was caused by anything other than market forces—that is, supply and demand.[11] For example, there is no evidence that the prices of Shell- or Texaco-branded gasoline increased *relative to the prices of any other brands of gasoline*, such as Chevron, BP, ARCO, Amoco, Unocal, Exxon or Mobil.[12] Moreover, there

---

situation in which the ancillary restraints doctrine applies and one, such as here, in which it does not.

[11] Contrary to Respondents' assertion, there is also no evidence that the price of the Texaco brand "[rose] to the level of the Shell brand." Brief for Respondents 11. The evidence is merely that, in those geographic areas where Equilon or Motiva sold both brands, the prices of the same grades of the same brands were the same. Indeed, Respondents stipulated below to the undisputed fact that "[p]rices in each trade area are set based on conditions in that particular trade area." J.A. 79 (¶ 63).

[12] AAI asserts that "Equilon would not have been able to raise the price of Texaco-brand gasoline without losing money to other rivals unless they were engaged in price coordination." Brief for AAI 26. There is, however, no evidence that Equilon raised the price of Texaco-branded gasoline *relative* to the prices of other brands, the only relevant measure. If the price of all brands increased by $0.20, there would be no reason for Texaco to lose market share or money to its rivals.

is no allegation or evidence of collusion or coordination between the joint ventures (or Shell or Texaco) and any other company in the United States gasoline market. Respondents' and their *amici*'s unsupported innuendo about "unexplained price hikes" (Brief for AAI 7) cannot substitute for evidence.

Second, Respondents assert that refining and marketing was previously profitable for Shell and Texaco and that the joint ventures were designed to avoid passing cost savings on to consumers – which cost savings, Respondents suggest, could have been achieved without forming the ventures. Brief for Respondents 5. Even if this were true, it would be relevant only to a rule of reason challenge to the formation of the joint venture. In any event, Respondents' citations for these points provide no support for them, and all of the evidence is to the contrary. Respondents' own evidence clearly shows that pre-venture refining and marketing profits were "insufficient" and "extremely poor." Appellants' Ninth Circuit Excerpts of Record 264, 279. Respondents' own evidence shows that the ventures would make possibly $800 million in cost savings that would not be possible without them, such as reducing duplication or redundancies. *E.g.*, *id.* at 605 ("Q. Okay. And the duplication was a result of the formation of the alliance, right? A. Yeah. Yeah."); *see also* Brief for Respondents 11 ("anticipated cost savings *from their combination*, estimated at $800 million per year" included elimination of redundancies between companies and avoidance of capital expenditures that would have been required but for ventures' formation) (emphasis added). The Ninth Circuit likewise found that "[t]here is a voluminous record documenting the economic justification for creating the joint ventures." Pet. App. 3a. Finally, Respondents' own evidence shows that all cost savings realized by the ventures would ultimately be passed on to consumers. Appellants' Ninth Circuit Excerpts of Record 300.[13]

---

[13] Respondents misleadingly questioned one deponent about whether he had directed or been specifically advised that "synergies

Third, Respondents assert that "Shell and Texaco . . . continued to control The Alliance's marketing of products bearing their brands" through the Brand Management Protocols. Brief for Respondents 32; *see also id.* at 2. Again, even if true, this would not change the fact that the brands did not compete once the joint ventures were formed—regardless of who controlled their marketing. But the Brand Management Protocols did not reserve control over anything about gasoline marketing to Shell or Texaco; they were administered solely by the relevant venture, operating through its management as overseen by a subcommittee of the venture's governing board (which was in turn made up of members appointed by Shell and Texaco, as the venture's owners). Contrary to Respondents' unsupported suggestion, there is no evidence that Shell or Texaco could have unilaterally "directed" (Brief for Respondents 32) how gasoline that a venture sold under its brand name would be marketed – let alone evidence that Shell or Texaco actually did so.

The Brand Management Protocols simply provide that, because the Shell and Texaco brand names were used by Shell and Texaco respectively outside of the ventures, neither venture will use either brand name in a way that would degrade or favor "the value, reputation, prestige and goodwill associated with the Texaco Symbols" over the "Shell Symbols" – or vice versa. Appellants' Ninth Circuit Excerpts of Record 167 & ff. *See also id.* at 443 (intent of Brand Management Protocols was to protect "brand images"). The Brand Management Protocols do not discuss price and there is no evidence that the pricing policy was "a direct

---

or costs savings" were being passed on to consumers, but the deponent himself explained that "the reason I'm hesitating is that people don't talk about prices changes in terms of synergies. What they talk about is what's the marketplace -." Appellants' Ninth Circuit Excerpts of Record 650-52.

outgrowth" of them. Brief for Respondents 6 n.10. Respondents themselves trumpet the undisputed evidence that there was no pre-formation discussion whatsoever of pricing. Brief for Respondents 6 n.10, 9-10 & n.14; *see also* J.A. 115 (¶ 25) ("The parties did not discuss what price the joint ventures would charge for gasoline upon or after formation.").[14] In any event, regardless of who controlled the marketing of either product (Shell, Texaco, the joint venture's management, or someone else), both Shell and Texaco stood to profit or lose based exclusively on the overall performance of the two products, so that the products were not in competition with each other.

Fourth, Respondents assert that there were "numerous exceptions permitting competitive activities outside The Alliance by Shell and Texaco." Brief for Respondents 32. Again, none of these Shell or Texaco activities outside the joint ventures changes the crucial fact that, after formation of the ventures, Shell and Texaco did not compete in the domestic wholesale marketing of gasoline. *See, e.g.*, Appellants' Ninth Circuit Excerpts of Record 402 (no exceptions to non-compete for domestic gasoline marketing); *see also* Appellees' Ninth Circuit Supplemental Excerpts of Record 107 (Respondents' expert characterized exclusions

---

[14] Respondents distort the testimony to the effect that the joint venturers carefully and properly avoided any pre-formation discussion of pricing to insinuate an "inten[tion] to fix prices" of which there is no evidence and that did not exist (*e.g.*, Brief for Respondents 9 & n.14). Likewise, Respondents' suggestion that documents were "destroyed" and would have shown something sinister (Brief for Respondents 10) is wholly unsupported. As the district court found, "Plaintiffs have no evidence that defendants concealed documents." Pet. App. 46a. Rather, as would be expected and the antitrust laws encourage, the parties entered into confidentiality agreements and took other precautions to insulate the work of the negotiating teams from Shell's and Texaco's ongoing operations. J.A. 114-15 (¶¶ 22-25) & ff.

from ventures as "de minimus"). The fact that the venture owners could compete outside the scope of the ventures shows that the agreements between Shell and Texaco were appropriately drawn narrowly to encompass only the activities of the joint ventures themselves.

Fifth, Respondents assert, without citation to anything in the record, that, "when the Alliance ended . . . Shell and Texaco resumed their 'competition' charging the same prices for their branded gasolines." Brief for Respondents 32. Nothing in the record supports this assertion; indeed, there could be nothing in the record, because the joint ventures ended after the summary judgment motions had been submitted. In any event, any post-venture joint conduct of Shell and Texaco would, in a case in which the issue was properly raised, be subject to antitrust scrutiny. The issue in *this* case relates to the pricing of Shell- and Texaco-branded gasoline manufactured, owned and sold by Equilon during the period when Shell and Texaco did not compete in the relevant market.

Finally, Respondents assert, again without citation, that "having identical prices for Shell and Texaco products inside the Alliance facilitated price uniformity for products outside The Alliance, such as aviation fuel . . . ." Brief for Respondents 32-33. Respondents' amici repeat the assertion, citing only the unsupported statement in Respondents' brief. Brief for the Retail Industry Leaders Ass'n 8, 16-17. Even if true, this assertion would be relevant at most to a rule of reason evaluation of the actual effects of the pricing decision. Again, however, there is absolutely no evidence that supports either part of the assertion—either that prices for other products were uniform or that the pricing of gasoline by the joint ventures had, or might even theoretically have had, any effect on those other prices.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

RONALD L. OLSON
Counsel of Record
BRADLEY S. PHILLIPS
STUART N. SENATOR
PAUL J. WATFORD
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner Shell Oil Company

December 2005